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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DYNALECTRIC COMPANY AND G.W. WALTHER EWALT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY MEMORANDUM OF DYNALECTRIC COMPANY AND G.W. WALTHER EWALT IN SUPPORT OF PETITION

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1. In its opposition to the Petition for Certiorari, the government attempts to downplay the importance of this case and the stark departure of the Eleventh Circuit's opinion from previous holdings of this Court.

To begin with, the government is wrong in contending that every court of appeals addressing the issue has ruled that mere contract performance and receipt of payment is the continuation of a Sherman Act bid-rigging conspiracy. Opp. at 6. Its attempt to dismiss as "dicta" the Ninth Circuit's holding in *United States v. Inryco, Inc.*, 642 F.2d 290 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982) is particularly misplaced. The *Inryco*

court's finding that the conspiracy involved continued restraints on competition was the essential rationale for its decision—a rationale overlooked by the Fourth and Eighth Circuits in their later decisions purporting to rely upon that opinion. Far from being dicta, the *Inryco* holding embraced the essence of a Sherman Act violation: its continuation depended upon continued restriction on trade. Both the decision below and other circuit holdings purporting to follow *Inryco* ignore this essential criminal element of a Sherman Act violation, and are therefore inconsistent.

Nor does the Ninth Circuit's subsequent opinion in *United States v. Walker*, 653 F.2d 1343 (9th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982), decided under the general conspiracy statute, 18 U.S.C. § 371, support the government's contentions. Opp. at 7 n.6. A conspiracy "to defraud" is inherently different from one "to restrain trade" and has a different essential criminal purpose. While the applicable statute of limitations may be the same, the nature of conduct made criminal by Congress is not, nor are the temporal dimensions of that criminal offense. The scope of the criminal behavior is not determined by the wording of the indictment—it is defined by the central criminal purpose of the conduct charged. Here, that purpose was to restrain trade.

The government's contentions also ignore an unbroken line of decisions where this Court has held that the prosecutor cannot extend the duration of a conspiracy—and thereby revive for prosecution stale claims—simply by alleging as conspirational "objectives" events that do not constitute essential elements of the offense charged. This is true not only in conspiracies, but also in other situations where this Court has focused on the conduct outlawed rather than the conduct alleged. *See, e.g.*, *Bridges v. United States*, 346 U.S. 209, 222-23 (1953) ("The embellishment of the indictment does not lengthen the time for prosecution. It is the statutory definition

of the offense that determines whether or not the statute of limitations comes within the Suspension Act."); *United States v. McElvain*, 272 U.S. 633 (1926) (alleged purpose to defraud did not enlarge the crime because it was not an essential element of the crime on which the indictment was based); *United States v. Noveck*, 271 U.S. 201 (1926) (same). The distinction between Section 371 offenses and other crimes was also made clear when this Court stated that an offense cannot be enlarged "by prosecutorial sleight of hand to overcome a time bar." *Dennis v. United States*, 384 U.S. 855, 863 (1966).

The fatal flaw of the government's logic lies in its misinterpretation of *Grunewald v. United States*, 353 U.S. 391 (1957). Contrary to the government's assertion, *Grunewald* allows conspiracies to continue only until the central *criminal* objective has been achieved or abandoned, not until all actions incident to that objective have come to pass. 353 U.S. at 405. Petitioners agree that lawful acts may be part of an illegal conspiracy. *See* Opp. at 8 n.7. But the government misses the essential distinction. The acts in furtherance of a conspiracy, whether they be legal or not, must be in pursuit of an illegal *objective*. Under the rationale of *Grunewald*, mere performance of a contract awarded as a result of an already completed restraint of trade cannot further that goal. If the law were otherwise, the government would merely have to allege (as it did here) that fruits were part of the alleged conspiratorial agreement and it would overcome, by *ipse dixit*, the holding in *United States v. Kissel*, 218 U.S. 601, 607 (1910) that "the mere continuance of the result of a crime does not continue the crime."

Perhaps in recognition of the infirmity of its argument, the government for the first time asserts that "trade was 'restrained' every time DeKalb County and . . . [the EPA] made payments on the artificially set contract

price." Opp. at 8 n.8. But this attempt to reconcile the instant case with *Grunewald* and *Inryco* is not supported by the record. Unlike *Inryco*, there is no allegation—or evidence—to even suggest that competition was restrained after the bidding. The court of appeals was correct in assuming that any restraint of trade ended when the contract was awarded (App. A at 11a), and in this *post hoc* justification effort the government is unable to offer any theory of how restraint on competition—the central criminal purpose of a Sherman Act conspiracy—might have occurred after the contract was let.[1]

To suggest, as the government does (Opp. at 9 n.8), that an act of confession is necessary to abandon a conspiracy is to argue for potentially indefinite tolling of the statute of limitations. *See* Pet. at 19. Contrary to the government's suggestion, withdrawal may be manifest in many ways, including "the [r]esumption of competitive behavior." *United States v. United States Gypsum Co.*, 438 U.S. 422, 464 (1978).

The government misreads *Hyde v. United States*, 225 U.S. 347 (1912), in suggesting that it stands for the proposition that petitioners could only abandon the conspiracy "by giving notice of the fraud." Opp. at 8 n.8. *Gypsum* teaches that *Hyde* cannot be so narrowly con-

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[1] The government's new argument that trade was "restrained" with the payments is not only unsupportable as a matter of law, but is inconsistent with the theory on which this case was tried. The jury was charged that "a conspiracy is an agreement between two or more persons to accomplish *an unlawful purpose*" (R24-3321), which, for bid rigging, was defined to be "an agreement between two or more persons *to limit or interfere with competition.*" R24-3319 (emphasis added). Nothing was said about profit or receipt of payments. In fact the jury was told that it did not matter whether the prices said "were reasonable or unreasonable, high or low." R24-3320. These instructions alone precluded any finding that trade was "restrained" every time DeKalb County made a payment on the contract.

strued. Instead, *Hyde* requires only that a co-conspirator must "withdraw his support from [the acts] or incur the guilt of their continuance." 225 U.S. at 369-70. This "withdrawal of support" to signal abandonment has perfect symmetry with the criterion of "continuous cooperation" for a conspiracy to continue. *United States v. Kissel*, 218 U.S. 601 (1910). Whatever cooperation or support Paxson got from Dynalectric and Ewalt, it certainly ended before the payments to CCC in 1985.

2. The government's position that receipt of payments continued the conspiracy is even more strained as applied to the *ex post facto* sentences imposed on Dynalectric and Ewalt. The government argues that "the offense continued until at least January 1985, when the last check was mailed to CCC Electric" (Opp. at 9 n.9) and that "*Petitioners* continued to accept payment on the contract until 1985." Opp. at 9 n.8 (emphasis added). Yet there was no allegation or evidence that Dynalectric or Ewalt shared in that check, and the unquestioned fact is that the joint venture ended in 1983. Moreover, the government ignores entirely the fact that the jury only found the alleged conspiracy to continue until September 20, 1981. R24-3323. Any argument of continuation beyond that date is pure conjecture unsupported by the jury's verdict.

3. In its attempt to explain the trial court's refusal to instruct the jury as to the defense theory (*See* Pet. at 21-24) the government quotes from requested instructions Numbers 15 and 18 and argues that they were not appropriate. Opp. at 15-16. But petitioners never claimed that the refusal to give those instructions was error. The error was with respect to request numbers 16 and 20, which were quoted in petitioners' brief to the Eleventh Circuit. These requested instructions, which are set forth below, would have provided the jury with a standard for determining whether the joint venture was a part of the alleged bid-rigging scheme.

Proposed Instruction #16:

> (2) Unless you specifically find beyond a reasonable doubt that Wesley C. Paxson and G. W. Walther Ewalt agreed on or before September 7, 1979 that Paxson Electric Company and Dynalectric Company would form a joint venture to perform the electrical construction portion of the work on the Snapfinger project, you must find Mr. Ewalt and Dynalectric Company not guilty.
>
> (3) Unless you specifically find beyond a reasonable doubt that Mr. Ewalt agreed to submit an artifically high bid on the Snapfinger project as partial compensation for Paxson Electric agreeing to enter into the joint venture, you must find Mr. Ewalt and Dynalectric not guilty [R4-92-24-25];

Proposed Instruction #20:

> [I]n order to find the defendants guilty, you must find that one or more of them committed some act or conduct in furtherance of the conspiracy after September 20, 1981. In particular, unless you find that Mr. Paxson and Mr. Ewalt agreed before the bid on September 7, 1979 that they would ~~form a~~ joint venture to perform the electrical construction portion of the Snapfinger project as part of an agreement to rig bids for that project, you must find all defendants not guilty. (footnote omitted) [R4-92-31-32].

The essential element contained in these instructions, and lacking in those given by the court, is a nexus between the alleged bid-rigging agreement and the joint venture, which was the conduct by which it was claimed that Dynalectric and Ewalt joined the alleged conspiracy and the only conduct by them that continued to within the statute of limitations.[2] Since there was evidence that

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[2] The refused instructions cited by the government are irrelevant to the issue on appeal. Contrary to the government's argument, nothing in the requested instructions would mislead the jury into

the joint venture was lawful (as the government has conceded, Pet. at 11) and since that was the theory of the defense (as the court below recognized, App. A at 4a), it was plain error to refuse these instructions.

4. The government tries to justify the erroneous rulings excluding defense economic evidence by claiming that it was barred from using evidence of high prices and profits to establish the conspiracy. Opp. at 6.[3] This is not only irrelevant, it is also a mischaracterization of the record, as is the government's argument that petitioners were permitted to show that these bids were not excessive. Opp. at 16.

The government contends that this evidence was irrelevant because there was no testimony that the participants actually took market conditions and copper prices into consideration in the preparation of their bids. The contention that "raw material" prices or "general market conditions" cannot be relevant unless there is this specific reliance during bid preparation is not only unsupportable in the record, but ignores the real-world context in which businessmen make pricing decisions. Furthermore, it overlooks the fact that Ewalt testified as to his concern about inflation and interest rates and explained how material costs in long-term contracts and changing conditions can affect profitability. R7-1284, R8-1456-1459. It is axiomatic that a company like Dynalectric, which submits hundreds of bids a year, must always have an awareness of the economy, labor and materials markets in making pricing commitments that extend far into the

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believing that a lawful joint venture would make a bid-rigging agreement lawful. Opp. at 15. To the contrary, they properly focused exclusively on the issue of whether the joint venture was *part* of the conspiracy to rig bids.

[3] This argument is fundamentally at odds with the government's claim that there was an "overcharge" to support its mail fraud theory (Opp. at 11 n.10) and of "illicit profits" to support a continuing conspiracy (Opp. at 8 n.8).

future. No firm would survive otherwise. To a jury, however, these factors must be explained and defendants were prohibited from doing that.[4]

The relevance of the economic evidence was not, as the government argues, removed from the case by the jury instructions. Opp. at 17. The jury was never told to disregard evidence of profits and the court denied defendants' requested instruction that evidence of high and unusual profits (emphasized by the prosecutor throughout the trial) could not be considered as proof of guilt. The government's attempt to reconcile the ruling below with those of other circuits is futile. Each squarely held that a defendant is entitled to present economic evidence to show the absence of a conspiracy irrespective of whether or not the prosecution introduced economic evidence. *See* Pet. at 25-26 and cases cited therein.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[4] Moreover, to suggest that "copper prices" were irrelevant because copper is in some distant "raw material market" (Opp. at 6) is disingenuous. The project required electrical cable—hundreds of miles of it—in which copper was the primary component. Defendants sought to illustrate the relation between copper and cable by introducing samples of conductor to show its copper content, but the district court excluded that evidence too.